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The Clash between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp

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The Clash Between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp

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[W]ildlife once fed us and shaped our culture. It still yields us pleasure for leisure hours, but we try to reap that pleasure by modern machinery and thus destroy part of its value. Reaping it by modern mentality would yield not only pleasure, but wisdom as well.¹

I. Introduction

Advances in technology and changes in political philosophies have brought about shifts in the relationships between developed nations, developing nations and those considered undeveloped. The balance of power, while still on the side of the developed nations, has with increasing frequency, shifted in the direction of the less developed nations.² This has been achieved through a number of steps, some deliberate and some quite accidental.³ Following World War II, the United States and other powers recognized the need for economic stability in order to ensure peace. Starting with Bretton Woods⁴ and continuing through its progeny, including the

1. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 187 (Oxford University Press 1987) (1949).

2. The United Nations is one such instance in which the power these emerging States can wield, particularly when they form a coalition, can effectively counter that of the most developed nations. *See* 1991 U.N.Y.B. 348, U.N. Sales No. E.92.I.1.

3. Identification of new resources or new sources of exhaustible resources often lead to a shift in a nation's position in the world market. The emergence of the oil rich Middle East or the technologically advanced Pacific Rim States are two of the most dramatic examples of this type of rise to prominence.

4. The Bretton Woods Conference (Bretton Woods) was held July 1-22, 1944 in Bretton Woods, NH. The conference, more formally known as the United Nations Monetary and Financial Conference, resulted in the creation of the International Monetary Fund (IMF) as well as the International Bank for Reconstruction and Development. By the summer of 1946 both creations had begun operation.

planning for the International Trade Organization and eventually the General Agreement on Tariffs and Trade (hereinafter GATT), the role of trade amongst nations has been increasingly institutionalized.⁵ The steps taken to provide for free trade have limited the ability of the United States and other developed nations to act unilaterally in order to further its goals; be they economic, political or environmental.

These same advances which have given rise to the globalization of the world's economy have also given rise to the globalization of the potential threats to not only the global economy but to the environment as well.⁶ While not expressly included in the Charter of the United Nations (U.N.), the U.N.'s position on the responsibility of nations to protect the environment was clearly stated over twenty-five years ago.⁷ "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the people of the whole world and the duty of all governments."⁸ It has become a generally accepted obligation under international law that each government, in the administration of its sovereign territory, must take into account protection of the environment.⁹ The environment to be safeguarded includes: natural non-living resources, flora,

5. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The International Trade Organization failed to come to fruition due to lack of support from key nations including the United States. GATT came into force in 1948 as a contract between 123 governments. These signatory states account for over 90 percent of the world merchandise trade. See also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1994 WL 761804 (GATT) [hereinafter Final Act].

6. For example, the development and use of nuclear energy, offshore drilling on the high seas, and the damming of rivers all pose potential threats not only to the environment but to economies as well.

7. See generally U.N. CHARTER.

8. *Report of the United Nations Conference on the Human Environment*, Stockholm, June 5-16, 1972, U.N. Doc. A/CONF.48/14 (1972).

9. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 29 (July 8).

and fauna. The level of protection afforded to these natural resources varies according to the risk each faces.

Threats to the environment come from a number of sources. Pollution of the atmosphere, deforestation, industrial waste, harvesting techniques as well as military conflict. All pose threats with potentially catastrophic results. Certain species of flora and fauna have been identified as being in particularly vulnerable situations.¹⁰ Amongst those species which are threatened are all seven species of sea turtles.¹¹ Sea turtles spend the vast majority of time at sea where little is known about their existence.¹² Sea turtles reproduce on land often migrating thousands of miles to reach their nesting grounds.¹³ Depending upon the species, it may take upwards of fifty years for an individual sea turtle to reach the age of reproduction.¹⁴ Sea turtles, or marine turtles, vary greatly in size and migratory patterns. For example, the leatherback turtle can grow up to eight feet in length and weigh up to 910 kilograms. They have been tracked diving to depths of over 3,600 feet and their migratory paths cover many thousands of miles.¹⁵ All species of sea turtles find themselves threatened in their natural habitats. The term "threatened" may, in the case of a species of sea turtle, mean that it is either "vulnerable" or "endangered."¹⁶

10. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Env'tl. L. Rep. STAT 40336 (in force July 1, 1975) [hereinafter CITES].

11. There are seven species of sea turtle: the flatback (*Chelonia depressa*), the green (*Chelonia mydas*), the hawksbill (*Eretmochelys imbricata*), Kemp's ridley (*Lepidochelys kempii*), the leatherback (*Dermochelys coriacea*), the loggerhead (*Caretta caretta*), and the olive ridley (*Lepidochelys olivacea*). See United States - Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 1998 WL 256632 at 4.

12. See *id.*

13. See *id.*

14. See *id.*

15. See generally World Wildlife Fund, *Trade and Environmental Law Clash in WTO Shrimp-Turtle Dispute* (visited Sept. 15, 1997) <http://www.panda.org/news/press/news_149.htm>.

16. The danger to all seven species of sea turtles is internationally recognized. The terms "vulnerable" and "endangered" may, in this context, be used either colloquially or in their more technical sense. See *supra* note 10 (CITES

Laws guaranteeing protection of the environment exist both in domestic law and in international law. Unlike the development of domestic environmental policy, the nature and processes involved in the formation of international environmental law give rise to an inherent vagueness of what is to be protected, where it is to be protected, and by whom it is to be protected.¹⁷ The schizophrenic personality which this dichotomy of domestic versus international policy presents is the source for the topic of this Comment. The United States has enacted statutes to protect the environment. Particularly relevant to the topic at hand is the Endangered Species Act (ESA)¹⁸ and Section 609 of the U.S. Public Law 101-162 (Section 609).¹⁹ Section 609 was passed in 1989 as an amendment to the ESA in order to more specifically increase protection of endangered sea turtles.²⁰ Certain restrictions provided for in the ESA require that products caught in such a manner as to pose a threat to an endangered or protected species may not be purchased or sold in the United States. Congress placed no geographical limitations on the application of the ESA.²¹ The ESA's scope extends beyond territorial seas and beyond the 200 mile Exclusive Economic Zone (EEZ) to all reaches of the globe. By applying United States law outside of United States' sovereign territory the United States is potentially acting in violation of GATT.²²

The World Trade Organization (WTO) has before it a dispute which embodies the struggle between international

includes all species of sea turtle, but the flatback, on their most endangered lists).

17. See generally W. Michael Reisman & Siegfried Wiessner, *International Law in Contemporary Perspective* (unpublished manuscript, on file with the author).

18. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994). [hereinafter ESA].

19. See 16 U.S.C. § 1537, [hereinafter Section 609] *amending* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544.

20. See 16 U.S.C. § 1537(b).

21. See *Earth Island Institute v. Christopher*, 913 F. Supp. 559, 577 (Ct. Int'l Trade 1995).

22. See *id.*

trade and the protection of the environment.²³ Thousands of sea turtles are being drowned each year by shrimping fleets from nations which do not require the use of Turtle Excluding Devices (TEDs).²⁴ In response to this, the United States has placed an embargo on imports of shrimp caught by ships from those nations which do not enforce the use of TEDs. The claim of the non-TED nations is that this unilateral enforcement of U.S. law amounts to a trade restriction and as such is a violation of GATT.²⁵

This Comment will, in Part II, discuss the tension between the Endangered Species Act and the General Agreement on Tariffs and Trade (GATT). With that as background, the Comment will turn in Part III to the differing views of international law and how it fits, if at all, with the domestic law of the nation. Part IV will then review the *Tuna* disputes to examine the dynamics between international and domestic law and more particularly the ESA and GATT.²⁶ The issue currently before the WTO is the use of trawling methods which endanger sea turtles. Part V analyzes this tension in light of the precedent set in the *Tuna* disputes as well as specific legislation passed both domestically and internationally. Part VI concludes that the strict interpretation of GATT leaves very little opportunity for nations to act unilaterally in order to protect the environment and offers little incentive for others to join those nations interested in conservation.

23. The World Trade Organization [hereinafter WTO] was created during the Uruguay Round as a result of pressures, primarily from developed nations, to facilitate resolution of trade issues. The WTO has, within its structure, the ability to create panels to address trade disputes. See *infra* note 41.

24. National Marine and Fisheries Service (NMFS) estimates conclude that shrimp trawling in Brazil, China, India and the Philippines account for the death of more than 11,000 sea turtles each year. Indian biologists, in a recent study, estimate that Indian trawlers killed 5,282 turtles in six months along 480 km of beaches. See David E. Kaczka, *A Primer on the Shrimp-Sea Turtle Controversy*, 6 RECIEL: REV. OF EUR. COMMUNITY AND INT'L ENVTL. L. 171, 173 (1997).

25. GATT prohibits signatory States from enacting either *de jure* or *de facto* restrictions on trade. Once a nation claims to have been denied some privilege to which they feel they are entitled under GATT, they may then proceed through the Dispute Settlement system.

26. See GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (adopted Sept. 3, 1991).

II. Laws in Conflict: The ESA and GATT/WTO

The struggle between ESA and international trade agreements had been anticipated during the debate surrounding the enactment of ESA in 1973.²⁷ The Act was seen as far reaching, extending beyond the United States' borders into the territory of other sovereign states. By authorizing the President to enact trade embargoes against nations found to be in violation of the ESA, Congress clearly showed its intent as to the breadth of this Act.²⁸ The subsequent 1989 ESA amendments to expand protection for sea turtles were held to be international in scope of application, regardless of whether or not they may run into conflict with GATT.²⁹ With this as the backdrop it is important to look at both the ESA and GATT to understand why this conflict has come to be.

A. The Endangered Species Act (ESA)

After the international community, including the United States, enacted CITES, Congress sought to enact a domestic policy which would further facilitate the stated goals of the international conference.³⁰ To that end, Congress enacted the Endangered Species Act. The stated purposes of the ESA are:

...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions. . .³¹

27. *See id.*

28. *See* 16 U.S.C. § 1538(a) (1994). *See also* Marine Mammal Protection Act, 16 U.S.C. § 1371(a) (1994) [hereinafter MMPA] (further supporting the argument that Congress intended to enforce protection of the environment extraterritorially).

29. *See* *Earth Island Inst. v. Christopher*, 913 F. Supp. at 577.

30. *See* CITES, *supra* note 10.

31. 16 U.S.C. § 1531(b) (1994).

No interpretation of the ESA can deny that Congress intended to apply the Act on an international scope.³² This is further supported by judicial findings.³³

If the ESA had not been intended to be applied globally but merely within the sovereign territory of the United States, the conflict between the U.S.'s domestic environmental law and its international trade agreements would nevertheless still remain unresolved. So long as the ESA does not allow the importation or the sale of products caught in such a way as to further jeopardize an endangered or threatened species, foreign nations could still make the same claim; that by limiting sales the United States has in effect created a restriction to trade. There is little doubt that the United States in the case of shrimp caught by vessels of non-TED nations, has put restrictions on trade. These restrictions appear to be in violation of GATT. The question the United States is now confronted with is whether the trade restriction and corresponding violation of GATT are justified or can be excused.

In 1989, in response to the detrimental effect of shrimp trawl fishing on sea turtles, the U.S. Department of Commerce instituted certain regulations pursuant to the 1973 ESA.³⁴ These initial regulations were met with strong disapproval from U.S. shrimpers who argued that it put them at an unfair disadvantage in the market when compared to shrimp imported from nations with less restrictive regula-

32. See 16 U.S.C. § 1531(a)(4) (A)-(G) (1994). The treaties and conventions referred to in § 1531(b) are listed in §(a)(4), which states:

[T]he United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction pursuant to: (A) migratory bird treaties with Canada and Mexico; (B) the Migratory and Endangered Bird Treaty with Japan; (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; (D) the International Convention for the Northwest Atlantic Fisheries; (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean; (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and (G) other international agreements

See *id.*

33. See *United States v. Bernal*, 90 F.3d 465 (11th Cir. 1996).

34. See *Shrimp Trawling Requirements*, 50 C.F.R. § 227.72(e)(2)-(4) (1990).

tions.³⁵ The government as well as environmental groups took the position that TEDs are extremely effective in protecting the endangered sea turtles and "represent the best compromise between net productivity [for shrimp trawlers] and conservation."³⁶

Congress, following the lead of the Department of Commerce, added a provision to the ESA. This provision called for the Secretary of State to initiate negotiations with foreign countries which engaged in fishing practices which may adversely affect sea turtles.³⁷ Included in these 1989 amendments is a prohibition on importation of shrimp and/or shrimp products from a foreign country whose harvesting adversely affects endangered or threatened sea turtle populations.³⁸ The amendment provides for a certification by which the President can certify to Congress that the foreign country has provided evidence that it has adopted a program to protect the sea turtles and that the incidental taking rate of its ships is comparable to the U.S. ships.³⁹ Once a nation has become certified the embargo is lifted. It has been noted by some that the potential for market disruption is tremendous as are the foreign policy implications. For this reason it is assumed that the President has broad discretionary powers in making his comparability standard determinations and certifications to Congress.⁴⁰

35. See Ted L. McDorman, *The GATT Consistency of US Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 495 (1991).

36. Cooper, *Gulf Shrimpers Attack TED's*, 70 NAT'L FISHERMAN 1 (Oct. 1989). Studies indicate that the nets are 97% effective in preventing sea turtles from drowning when trapped by the nets of the shrimping vessels.

37. See McDorman, *supra* note 35.

38. See McDorman, *supra* note 35.

39. See McDorman, *supra* note 25.

40. See *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 976 (N.D. Cal. 1990). See also Chandler, *Use of International Trade Restrictions as a Conservation Measure for Marine Resources*, (Dec. 1990) (unpublished paper, on file with the *George Washington Journal of International Law and Economics*) (discussing unilateral trade restrictions imposed by the U.S.). See also, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

B. General Agreement on Tariffs and Trade (GATT)

GATT entered into force in 1948 as a contract between 123 governments (signatory states). "The chief objective of the GATT is to provide a secure and predictable international trading environment, as well as a continuing process of market opening."⁴¹ With the growth of free trade and concurrent rise in awareness of environmental issues, it became apparent that GATT was ill equipped to deal with the new realities of free trade on a global level. Many nations recognized this shortcoming and in 1986 trade ministers from the GATT signatory states agreed to meet. This meeting has become known as the Uruguay Round.⁴² Of primary concern to many of the contracting parties was the need for a more effective and expeditious dispute resolution mechanism by which conflicts between nations could be resolved. To this end, the Agreements called for the creation of the World Trade Organization (WTO).⁴³ The WTO serves as an umbrella organization by embodying all of the Agreements reached by GATT.⁴⁴ During the Uruguay Round proceedings it became apparent that the conflict between trade and the environment would need to be addressed as well.

1. The Uruguay Round: Goals of the WTO and Improving on GATT

In establishing the WTO the contracting nations hoped to create an efficient and effective mechanism within the organization which could handle dispute resolution. This mech-

41. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. OF THE PRESIDENT, THE URUGUAY ROUND AGREEMENT ACT, THE GATT URUGUAY ROUND AGREEMENTS: REPORT ON ENVIRONMENTAL ISSUES, 1994 WL 761804.

42. The Uruguay Round derives its name from the place in which it was agreed upon, Punta Del Este, Uruguay not where it was signed into effect. It was finally signed into effect on April 15, 1994 in Marrakech.

43. The GATT Uruguay Round lead to a number of agreements. In addition to the creation of the World Trade Organization, the Uruguay Round lead to: the Agreement on Sanitary and Phytosanitary Measures (S&P Agreement), Agreement on Technical Barriers to Trade (TBT), Agreement on Subsidies and Countervailing Measures as well as the Dispute Settlement Procedures (DSP). See OFF. OF THE U.S. TRADE REP., *supra* note 41.

44. See OFF. OF THE U.S. TRADE REP., *supra* note 41.

anism affords countries with small and/or developing economies the opportunity to obtain a fair hearing without being subject to threats of linkage or unilateral reprisal. In addition, larger and/or more developed nations would be able to utilize the dispute resolution mechanism to try to ensure compliance which other nations may have been able to avoid in the past. By having a central mechanism by which to resolve disputes, less developed nations need no longer fear unilateral action by the more developed nations and the developed nations no longer resort to such unpopular methods in order to enforce compliance.⁴⁵

2. WTO's Dispute Settlement System

The actual mechanisms by which disputes are to be settled by the WTO are laid out in the "Understanding on Rules and Procedures Governing the Settlement of Disputes."⁴⁶ The Dispute Settlement procedure is designed to promote consultation and mediation and resolve all disputes within a short period of time.⁴⁷ The initial stage of dispute settlement is a period of consultations and mediation.⁴⁸ The consultation period, as designed, is to last up to sixty days.⁴⁹ The countries involved in the dispute must consult with each other to see if they can reach a mutually agreeable settlement.⁵⁰ During this phase the assistance of the WTO direc-

45. See Alan D. Minyard, *The World Trade Organization: History, Structure, and Analysis*, (visited Oct. 1, 1997) (hereinafter Minyard) <<http://www2.netdoor.com/~aminyard/>>.

46. World Trade Organization, *About the WTO*, (visited Sept. 22, 1997) (hereinafter WTO dispute 1) <<http://www.wto.org/about/dispute1.html>>.

47. See *id.* The Dispute Settlement process of the WTO differs in some significant ways from GATT in that the time frame has been shortened and contracting members can not block the formation of a dispute settlement panel (DSP). Rulings are now automatically adopted unless there is a consensus to a reject a ruling thus no individual nation maintains veto power.

48. See *id.* See also Amelia Porges, *Introductory Note for the Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 I.L.M. 1125 (1994). See also Understanding on Rules and Procedures Governing Settlement of Disputes, 33 I.L.M. 1226 (Apr. 15, 1994).

49. See World Trade Organization, *About the WTO*, (visited Sept. 22, 1997) WTO at <<http://www.wto.org/about/dispute2.html>>.

50. See WTO dispute 1, *supra* note 46.

tor-general may be requested.⁵¹ The second stage is the Dispute Settlement Panel (hereinafter Panel) stage.⁵² Within 45 days a Panel is to be created.⁵³ This Panel is given six months to attempt to resolve the dispute.⁵⁴ Technically, as created, the Panel is helping the Dispute Settlement Body (DSB) make rulings and recommendations.⁵⁵ The Panel's recommendation is then passed on to the DSB for final adoption.⁵⁶ This process, in theory, lasts three weeks.⁵⁷ From beginning to end, the dispute settlement process is scheduled to take no more than one year.⁵⁸ Appeals can add another three months to the process.⁵⁹ The dispute settlement mechanism adopted by the WTO is a great improvement over that employed by GATT.⁶⁰ Individual nations can no longer single-handedly block the formation of a Panel nor the adoption of the Panel's recommendation. In addition, the time from initial complaint to resolution has been greatly reduced.⁶¹

3. GATT and the Environment

When GATT was initially drafted some fifty years ago environmental policy was in its infancy.⁶² As a result GATT does not specifically deal with the environment, but instead treats it as it does all other policy measures.⁶³ At the commencement of the Uruguay Round, the need for further development of GATT's environmental policy was still not fully appreciated. As the Uruguay round dragged on, however,

51. See Minyard, *supra* note 45.

52. See Minyard, *supra* note 45.

53. See WTO dispute 1, *supra* note 46.

54. See Minyard, *supra* note 45.

55. See Minyard, *supra* note 45.

56. See WTO dispute 1, *supra* note 46.

57. See WTO dispute 1, *supra* note 46.

58. See WTO dispute 1, *supra* note 46.

59. See WTO dispute 1, *supra* note 46.

60. See OFF. OF THE U.S. TRADE REP., *supra* note 41.

61. The increased efficacy of the WTO's Dispute Settlement system is exemplified by the diversity of nations bringing complaint. In addition, almost 30% of cases are settled before a panel is formed. See Renato Ruggiero, *The WTO's 'most individual contribution'*, ABOUT THE WTO (visited Apr. 17, 1997) <<http://www.wto.org/about/dispute1.html>>.

62. See OFF. OF THE U.S. TRADE REP., *supra* note 41, at 3.

63. See OFF. OF THE U.S. TRADE REP., *supra* note 41, at 3.

pressure from governments, including the United States, non-governmental organizations (NGOs), and certain world events brought the need for provisions to deal with the environment to the front.⁶⁴ The preamble to the Agreement Establishing the WTO includes a specific commitment to the objective of sustainable development.⁶⁵ In addition, the Ministerial Decision on Trade and Environment establishes a full WTO Committee on Trade and the Environment.⁶⁶ While the Uruguay Round participants recognized a need to protect the environment, no system was created to specifically handle environmental issues raised by trade disputes, or for that matter, trade disputes raised by environmental issues. The adjudication of environmental disputes is forced through a system designed to handle trade issues.⁶⁷ This is like trying to fit a square peg into a round hole, an exercise in futility.

The WTO Committee on Trade and Environment (CTE) was established in January of 1995.⁶⁸ The CTE is responsible for improving the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to Multilateral Environmental Agreements (MEAs).⁶⁹ In fact, the CTE has jurisdiction over cases or controversies involving the environment only as may be consequentially implicated by trade agreements.⁷⁰ In addition, resorting to the CTE as a source of hope for environmentalists or governments wishing to increase the level protection of the environment may prove to

64. Environmental disasters such as the Exxon Valdez incident, the explosion of a chemicals plant in Bhopal, India, an accelerating rate of deforestation of the world's rainforests, as well as acts of terrorism against the environment (e.g. Iraq's policy of blowing up Kuwaiti oil fields) illustrated the extent to which the environment needed additional protections.

65. See OFF. OF THE U.S. TRADE REP., *supra* note 41, at 4.

66. See OFF. OF THE U.S. TRADE REP., *supra* note 41, at app. B.

67. See C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANS-NAT'L L. 209, 250 (Mar. 1997).

68. See OFF. OF THE U.S. TRADE REP., *supra* note 41.

69. See *Beyond the WTO: Finding Appropriate Homes. . . Issues of Trade and Sustainable Development*, INT'L INST. ON SUSTAINABLE DEV. (visited Sept. 25, 1997) <<http://iisd1.iisd.ca/wto/ctereport.html>>.

70. See *id.*

be futile. One of the proposed options for resolving those issues which may exist between the WTO and MEAs is for "[m]embers to avoid using trade measures in MEAs which are inconsistent with their WTO obligations."⁷¹ This is somewhat like trying to lower the murder rate by legalizing murder. The result may look like an improvement on paper but the end result will be the same. While this 'solution' will result in fewer complaints for the DSB, it will not help the environment.

III. International Law v. Domestic Law: Us vs. Them, We All Lose

Conflicts between the laws of the United States and those of the constituent states have for the most part been resolved.⁷² The laws of the United States are supreme over the laws of any individual state.⁷³ Certainly there exist conflicts between the laws of the several states and those of the United States, but an accepted methodology for resolving these disputes has been developed. The issue of the conflict of laws is still alive and well in the forum of international law. The United States has maintained that so long as it is not a party to an international agreement it cannot be bound by said agreement. Whether this is or is not the case is beyond the scope of this Comment.⁷⁴ The issue arises in a real and concrete way where the United States has become party to an international agreement. Once the agreement or treaty has been signed by the President and ratified by the Senate, that law becomes the "law of the land."⁷⁵ Or does it? Where does this new "law of the land" fall in the hierarchy of laws? Is it of the same weight as constitutional law or more like a federal statute enacted by Congress? Should it be treated as a

71. *Id.*

72. *See* U.S. CONST. art. VI, § 2.

73. *See id.* *See also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

74. *See generally* Reisman & Wiessner, *supra* note 17. For example, the Law of the Sea Treaty was never signed by the United States. International law has been interpreted to imply that a nation will be bound by an agreement, regardless of whether it is a signatory, when that agreement has become the generally accepted or *de jure* body of law in a given area.

75. *See generally* Reisman & Wiessner, *supra* note 17.

separate class of law? The two general theories of the relationship between international law and domestic law are dualism and monism. As these names imply, they offer differing theories as to the dynamics of legal systems.

A. Dualism: Two Separate Systems, One Incomplete Result

Briefly, dualism is the theory that the legal systems of sovereign nations exist separately from the body of international law.⁷⁶ Dualists argue that the sovereignty of nations is what gives force to international law and only by keeping these legal systems separate can the world move on in a peaceful manner. This may seem to be a bit of an oversimplification but for the purposes of this Comment this is as far as this concept needs to be expanded.⁷⁷ Dualism can either be a recognized practice of the legal institutions of a State (*de facto*) or it may be a tacit approach (*de jure*).⁷⁸

Either *de facto* or *de jure*, the implications for the environment are similar. By maintaining the supremacy of the domestic legal system and its laws, States fail to recognize that international law, under the current regime of multilateral agreements, is perhaps the only way to enforce environmental protection laws beyond a nation's borders. For a sovereign State to attempt to enforce its laws extraterritorially and without resorting to possible violence, which is generally accepted as illegal in both dualist and monist views of law, is next to impossible.⁷⁹ The United States has attempted to enforce its environmental standards around the rest of the globe.⁸⁰ While the goals of the U.S. laws may be

76. See generally Reisman & Wiessner, *supra* note 17, at 3.

77. See generally Reisman & Wiessner, *supra* note 17, at 4.

78. Classroom Discussion with Prof. Gayle Westerman, Professor of Law, Pace University School of Law, White Plains, NY, (Sept. 1997). See generally Reisman & Weissner, *supra* note 17.

79. The decisions of the WTO are merely examples of one international trade organization. Many more examples can be seen in the decisions of the ICJ as well as UN resolutions.

80. The subject of this Comment, the Sea Turtle/Shrimp dispute, is a prime example. In addition, the Venezuelan Gasoline dispute is another example in which the United States' attempts to enforce its environmental standards on a

desirable from the standpoint of protecting the environment, they have been struck down by the WTO on a number of occasions. This may not bother a true dualist who views U.S. law (or any sovereign State's law) as superior to its international counterpart and any decisions against it therefore to be of little consequence. Unfortunately, this view fails to recognize that the environment is not being protected whether the United States likes it or not.

For example, the EPA has passed relatively stringent regulations regarding certain substances which are found in gasoline. Venezuelan gasoline contained more than the amount set by the EPA.⁸¹ As a result the United States refused to import this gasoline, maintaining that EPA regulations took supremacy over GATT trade regulations which do not allow an embargo of this type.⁸² As a result of this position, the United States was found to be in violation of GATT and was fined \$100 million per year. The United States maintained its position for three years before the EPA capitulated and rewrote its standards in such a way as to admit the Venezuelan product.⁸³ The \$300 million price tag the U.S. was forced to pay ended up not in preventing dirty gasoline from being imported nor in establishing the supremacy of U.S. environmental law but instead resulted in the lowering of the EPA's standards and a capitulation to an international tribunal's findings which were clearly contrary to U.S. interests.⁸⁴

global level have been challenged. There are, however, many other examples in which the standards set by the U.S. have been capitulated to whether it be through financial means, diplomatic measures, etc.

81. See World Trade Organization Appellate Body: Report of the Appellate Body in United States—Standards for Reformulated and Conventional Gasoline, 35 I.L.M. 603 (May 1996).

82. See *id.*

83. See *id.*

84. It is interesting to note that many commentators believe that the EPA decision to rewrite its regulations was delayed until after the 1996 Presidential election to avoid embarrassing sovereignty issues.

B. Monism: One Integrated Legal System, One Missing Element

Monism seems to be the wave of the future. Monism views the relationship between domestic law and international law as one of fusion.⁸⁵ International law need not be superior to domestic law so long as it is not sublimated. The recognition by sovereign States that international laws must be adhered to will facilitate both free trade and protection of the environment.⁸⁶ Admittedly, this position may be viewed as somewhat idealistic. To use the United States for the purposes of analogy, suppose each sovereign State was similar to one of the fifty states in its relationship to some international body. As with each of the states, arguably to an even greater degree, each nation may have differing views as to what it feels should be law. Differing resources, histories, cultural priorities, etc. all make international lawmaking a daunting task. Perhaps the single most significant hurdle monism faces in gaining acceptance and incorporation is its lack of enforceability.

The most visible symbol of monism is the United Nations. The hurdles faced by monism in gaining acceptance as a viable system of laws are seen in the criticisms faced by the United Nations. Since its inception the U.N. has been criticized for its ineffectual nature. The Security Council is free to issue resolutions but without enforcing these resolutions it is a largely impotent body.⁸⁷ This same lack of ability to enforce its rulings has plagued (although some may argue, blessed) the ICJ.⁸⁸ Ideally, all nations would have the same

85. See Reisman & Wiessner, *supra* note 17.

86. See Reisman & Wiessner, *supra* note 17.

87. See U.N. CHARTER art. 23-32. (describing the make-up and role of the Security Council). The author wishes to note that as this paper is being written, the Secretary General of the U.N., Kofi Annan, is traveling to Iraq to attempt a diplomatic resolution to the current crisis. This crisis is of the nature discussed above, namely the Security Council's inability to effectively enforce the U.N. resolution which came about at the end of the Gulf War which requires Iraq to allow U.N. weapons inspections teams to monitor Iraq's cache of weapons.

88. See *id.* Some have argued that many of the ICJ's decisions were tempered by the reality that there was no way to enforce them. To avoid embarrassment and loss of credibility the ICJ simply has tried to please everyone.

priorities and would agree to some body as the source for international law. This body would be endowed with the ability to render judgment on disputes quickly and fairly and then enforce these judgments with no fear of reprisal.

IV. Tuna/Dolphin Dispute and the GATT Exceptions: A Fatal Analogy?

Under GATT certain exceptions exist which allow nations to take measures limiting trade that normally would be considered violations of GATT. There are essentially four such exceptions. Examining the current dispute between the United States (as defendant) and Malaysia (as complaining nation) in the shadow of the Tuna/Dolphin dispute between the U.S. and Mexico, it would seem that these exceptions may not be enough to protect the United States' position or more importantly protect the environment.⁸⁹

A. The Article III Exception

The first of these GATT exceptions is Article III.⁹⁰ Article III allows for point of importation regulations.⁹¹ These regulations in the form of taxes, which would ordinarily not be allowed by GATT, are considered internal regulations so long as the products of one country imported into another country are "accorded treatment no less favourable than that accorded to like"⁹² domestic products. In an attempt to utilize this exception the United States' argument to the Panel should be that the burden being placed on the foreign shrimpers is no greater than that placed on the domestic fisherman as evidenced by 1989 Sea Turtle amendments provision for certification by the President.⁹³ By allowing for

89. See GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (adopted Sept. 3, 1991).

90. See GATT art. III.

91. See *id.*

92. GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594, 1617 (adopted Sept. 3, 1991).

93. See Marine Mammal Protection Act, 16 U.S.C. § 1371(a) (1994) (further supporting the argument that Congress intended to enforce protection of the environment extraterritorially).

certification, Congress has given foreign nations the ability to avoid taxes on their products so long as that nation has taken adequate measures to protect sea turtles. While this may seem to be a compelling argument, recent history has proven that this may not be a winning position.⁹⁴

In 1991, Mexico requested the contracting parties to GATT to form a dispute resolution panel (hereinafter Tuna Panel) to review American trade regulations addressing methods for catching tuna which may endanger dolphins.⁹⁵ By regulating the method by which tuna could be caught and banning import of any tuna caught in such a manner as to be in violation of these regulation(s), the United States sought to enforce its Marine Mammal Protection Act (MMPA) on foreign nations.⁹⁶ Mexico argued that the United States' actions had created trade restrictions and as such Mexico had been denied access to U.S. markets to which it was entitled under GATT. In 1972, the Tuna Panel concluded that because the Act in question, the MMPA,⁹⁷ did not regulate the tuna as a product nor the sale of tuna as a product the Act was not allowable under GATT's Article III.⁹⁸ The situation in the Tuna/Dolphin dispute is analogous to that in the Shrimp/Sea Turtle dispute. It is alleged that the U.S. is seeking to unilaterally regulate the way in which shrimp may be netted.⁹⁹ Although the WTO does not employ *stare decisis*¹⁰⁰ or precedent as such, the Panel is able to look at the conclusions of previous Panels and use these decisions for guidance.¹⁰¹

94. See GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (adopted Sept. 3, 1991).

95. See *id.*

96. See Marine Mammal Protection Act, 16 U.S.C. § 1371(a) (1994) (further supporting the argument that Congress intended to enforce protection of the environment extraterritorially).

97. See Marine Mammal Protection Act, 16 U.S.C. §§ 1371-1421(h) (1994).

98. See GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (adopted Sept. 3, 1991).

99. See WTO, Shrimp-Sea Turtle Dispute Resolution Panel (Feb. 25, 1997).

100. See BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). (Which defines *stare decisis* as, "[t]o abide by, or adhere to, decided cases.")

101. See Amelia Porges, *Introductory Note for the Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 I.L.M. 1125 (1994). See

B. The Article XI(2)(c)(i) Exception

Article XI(2)(c)(i) provides the second potential exception to GATT which may allow for the U.S. actions. This Article is intended to preserve exhaustible natural resources by allowing nations to reduce the amount of imports.¹⁰² The importing nation must however reduce the amount its domestic producers can sell in proportion to the restriction on imported goods. In essence, under this exception the total number of imports may be reduced so long as it does not amount to a complete ban and domestic goods are also restricted.¹⁰³ In addition, however, the restriction on the imported product must be in proportion to restrictions on the domestic equivalent product. This is a quantitative measure, not a qualitative one. Thus the equivalency test is based on tonnage as opposed to methods of trawling.¹⁰⁴ The nation moving to ban the import may only use this exception if there is a similar domestic product which moves through the market in similar quantities.¹⁰⁵ The United States tuna production certainly fulfills this prong of the exception. It fails, however, in its effect. Because domestic law requires U.S. vessels to use approved nets there is in effect no restriction on U.S. tuna by weight. So long as the vessels use approved netting methods there will be no restriction according to tonnage. Thus the domestic equivalency element of the exception is not satisfied.

C. The Article XX(b) Exception

The third exception to GATT which may allow for restrictions on trade is found in Article XX(b).¹⁰⁶ Article XX(b) provides for measures "necessary to protect human, animal or plant life or health."¹⁰⁷ In addition to being "necessary," as

also Understanding on Rules and Procedures Governing Settlement of Disputes, 33 I.L.M. 1226 (Apr. 15, 1994).

102. See GATT, *supra* note 5 at art. XI(2)(c)(i).

103. See McDorman, *supra* note 35 at 513.

104. See GATT, *supra* note 5 at art. XI(2)(c)(i).

105. See GATT, *supra* note 5 at art. XI(2)(c)(i).

106. See GATT, *supra* note 5 at art. XX(b).

107. GATT, *supra* note 5 at art. XX(b).

described above, these restrictions will only be allowable so long as they are not disguised restrictions on international trade or are not applied in an arbitrary or unjustifiably discriminatory manner.¹⁰⁸ "The United States argued that the MMPA's import provisions fell within Article XX(b)'s exception because (1) they served the sole purpose of protecting dolphin lives, (2) they were 'necessary' within the meaning of Article XX(b), and (3) no alternative measures were reasonably available to the United States to protect dolphin health and lives outside of the United States' jurisdiction."¹⁰⁹ Mexico countered these arguments asserting: (1) Article XX(b) was not applicable outside the territory of the contracting party adopting the measures; and (2) the United States had other means of achieving its goals besides its embargo of tuna.¹¹⁰ The Panel agreed with Mexico's arguments. In determining the scope of Article XX(b), the Panel looked to the source of the Article. Section 32(b) of the Draft Charter of the International Trade Organization (ITO) the Panel concluded that the drafters intended Article XX(b) to apply domestically only.¹¹¹ The Panel further found that if Article XX(b) was to apply extraterritorially, each country would then be able to legislate for all other areas of the world which could not have been the drafter's intent.¹¹² Only those countries with exactly the same domestic law would not be in conflict. As for Mexico's second argument, the Panel found that the United States had not exhausted other means by which to achieve its goals. In the Panel's view, the MMPA did not fit into the exception provided for by Article XX(b).¹¹³

108. See GATT, *supra* note 5 at art. XX(b).

109. Robert F. Housman & Durwood J. Zaelke, *The Collision of the Environment and Trade: The GATT Tuna/Dolphin Decision*, 22 ENVTL. L. REP. 10268 (Apr. 1992).

110. See *id.*

111. See *id.*

112. See GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (adopted Sept. 3, 1991).

113. See *id.*

D. The Article XX(g) Exception

The final exception can be found in Article XX(g), which provides for measures "relating to the conservation of exhaustible resources."¹¹⁴ The arguments put forth by the United States and Mexico fall along similar lines to those urged in deliberating the Article XX(b) exception. The Panel agreed with Mexico's claim that Article XX(g) cannot be applied extraterritorially. Again looking to the framer's intentions, the Panel concluded that the framer's intended to construe this exception strictly. It was concluded that the ability of a sovereign to regulate an exhaustible resource applied only within the boundaries of its territory. The Panel then determined that the only way a contracting nation can effectively control an exhaustible natural resource is if that resource is within that nation's territory.¹¹⁵

It is important to bear in mind that all of the GATT exceptions are to be construed narrowly.¹¹⁶ The conflict between Mexico and the United States as decided by the Panel sent a very clear, and to U.S. fishermen and environmental groups, disheartening message. The Panel had effectively eliminated the United States' ability to act unilaterally to protect the environment. Eliminating unilateral obstacles to free trade is, after all, one of the primary purposes of GATT and by extension the WTO.¹¹⁷ For those governments genuinely concerned with protection of the environment, eliminating unilateralism from their toolbox seriously hampers their ability to act effectively to protect and conserve. As a result, trade may flourish but the environment suffers.

V. The Shrimp/Sea Turtle Dispute: Different Actors, Same Play?

With the Tuna dispute as background and the explanation of the GATT exceptions, this Comment now turns to the dispute at hand. As stated earlier, the WTO is a non-prece-

114. GATT, *supra* note 5 at art. XX(g).

115. See Housman & Zaelke, *supra* note 109.

116. See generally GATT, *supra* note 5.

117. See GATT, *supra* note 5.

dent or non *stare decisis* system; the DSB is not bound by previous decisions but may use these prior decisions as a basis for its reasoning in future decisions. Whether the Panel would choose to use the Tuna Panel's reasoning and apply it to the Shrimp/Sea Turtle dispute was one of great speculation amongst the interested parties. As expected by many the Panel has found that the United States' Section 609 is inconsistent with GATT, in particular XI and that it does not fit within any of the exceptions mentioned above.¹¹⁸

A. Background

Shrimp trawlers tend to operate in shallow coastal waters which are often frequented by sea turtles.¹¹⁹ The methods employed by the shrimpers often result in the death of a number of sea creatures which are not the sought after product.¹²⁰ Shrimp boats use trawling nets which by design are dragged behind the vessel.¹²¹ These nets entangle all that is in their path. When a sea turtle is entangled in the net, it is unable to surface to breathe. Depending on the trawling times sea turtles are drowned as a consequence.¹²² The use of TEDs has been estimated to save ninety percent of those turtles which are initially caught in the net.¹²³ The TEDs are viewed, at least by the United States, as an inexpensive, simple method to protect the endangered and threatened sea turtles.

118. See 1998 WL 256632 (W.T.O.), *supra* note 11 at 300.

119. See Kathleen Doyle Yaninek, *Turtle Excluder Device Regulations: Laws Sea Turtles Can Live With*, 21 N.C. CENT. L.J. 256 (1995).

120. See *id.*

121. See Paul Stanton Kibel, *Justice for the Sea Turtle: Marine Conservation and the Court of International Trade*, 15 UCLA J. ENVTL. L. & POL'Y 57, 59 (1996-97).

122. It is worthy of note that some have suggested shortening trawling times as a way of saving sea turtles. While in theory this may be effective, it would be extremely difficult to enforce. The majority of trawling vessels employed in shrimping are large (over 25 feet) and drag two or more nets. These types of vessels tend to have long trawl times, in excess of 90 minutes. Turtles caught in these nets have little chance of survival. See Kaczka, *supra* note 24.

123. See Kibel *supra* note 121 at 61.

B. Public Law Section 609 No. 101-162

All species of sea turtles are migratory. Much of their migratory path takes them through the waters of the U.S., in which they are largely protected, and into waters of other nations which do not require the use of TEDs. In order to counter the threat to the sea turtles while outside of U.S. territorial seas, Public Law 101-162 § 609 was passed.¹²⁴ Section 609 embodies two methods to promote the use of TEDs.¹²⁵

The first method provided for in Section 609 directs the Executive branch, through the Departments of State and Commerce, to identify those nations whose fishing practices endanger sea turtles. Once identified, the U.S. is to negotiate agreements with these nations. These agreements are to require the use of TEDs. In addition, the Department of State is to work to amend existing conservation treaties to include TED requirements. As an incentive to shrimp harvesting nations, under the aegis of Section 609, the Department of State and the NMFS created a TED technology transfer program. This program offered through the U.S. Agency for International Development provides training on construction, installation and usage of TEDs. It is offered at no charge to fishermen and government representatives.¹²⁶

The second prong of Section 609 is the source of the controversy currently before the WTO. Section 609(b) provides for a ban on imported shrimp harvested in a manner that poses a threat to sea turtles.¹²⁷ The ban is based on the fishing practices of each country as well as that government's policies.¹²⁸ These policies are to be reviewed by the State Department. Nations whose policies are largely similar to ours,

124. See Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537) (1992).

125. Application of Section 609 was expanded globally by the U.S. Court of International Trade. See *Earth Island Inst. v. Christopher*, 913 F. Supp. 559 (1995).

126. See Kaczka, *supra* note 24.

127. See Conservation of Sea Turtles; Importation of Shrimp, Pub. L. No. 101-162, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537) (1992).

128. See *id.* See also Steve Charnowitz, *Dolphins and Tuna: An Analysis of the Second GATT Panel Report*, 24 *Envtl. L. Rep.* 10567 (1994).

in terms of results, may be exempted from the ban and will be completely unaffected by Section 609. The regulations imposed by foreign nations on their shrimping fleets need only be largely comparable to those required by the ESA.¹²⁹ Factors such as incidental take rates as well as trawl types and tow times are taken into account in the State Department's evaluation.¹³⁰ U.S. fishermen must comply with the ESA as amended in 1989.¹³¹ The ESA requires the use of TEDs which release at least 97% of turtles encountered.¹³²

Initially Section 609 was applied only in the wider Caribbean. This limited application was protested by environmental groups which sued to expand its application.¹³³ The court's ruling that Section 609 was to be applied globally widened the scope of the effected nations.¹³⁴ Several nations challenged Section 609 as being inconsistent with GATT. India, Thailand, Malaysia and Pakistan all have joined in the complaint and requested formation of a DSP. In light of earlier decisions in the *Tuna* cases as well as the Venezuelan Gasoline case, it seems unlikely that the Panel will find Section 609 to be consistent with GATT.¹³⁵

C. International Law's Protection of the Sea Turtle

The unilateral effort of the United States is not the sole attempt at protecting sea turtles. A number of international agreements have entered into force which in effect should protect the sea turtles.¹³⁶ The application and enforcement of these agreements is often difficult at best and impossible at

129. See *Shrimp Trawling Requirements*, 50 C.F.R. § 227.72(e)(2)-(4) (1990).

130. Tow time is the interval between trawl doors entering the water and the trawl doors being removed from the water. See 1998 WL 256632, at 301 (W.T.O.).

131. See *id.*

132. See *id.*

133. See *Earth Island Inst. v. Christopher*, 913 F. Supp. at 559.

134. See *id.*

135. See GATT Dispute Settlement Panel, *United States Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) at 155 (1991), reprinted in 30 I.L.M. at 1594 (1991) [hereinafter *Tuna I*]. See also GATT Dispute Settlement Panel, *United States Restrictions on Imports of Tuna*, reprinted in 33 I.L.M. 839 (1994) [hereinafter *Tuna II*].

136. See 16 U.S.C. § 1531 (1994).

worst. The efficacy of these agreements have come into question. No international treaties specifically call for the use of TEDs despite the efforts of the Department of State required by Section 609. Instead, many international agreements utilize broad provisions which may (or may not) be interpreted to obligate states to protect sea turtles through domestic regulations.

The Convention on the Conservation of Migratory Species of Wild Animals [hereinafter the Bonn Convention] obligates signatory States to prohibit the taking of endangered migratory animals. The Bonn Convention defines taking in broad terms which include prohibition on "hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in such activity."¹³⁷ This definition includes both intentional and incidental taking. The Convention on Biological Diversity [hereinafter Biodiversity Convention] requires parties to enact legislation protecting threatened and endangered species. In addition, the nations must regulate processes which have a significant adverse effect on biological diversity.¹³⁸

The United Nations has not been silent on the issue of protecting the environment. The United Nations Convention on the Law of the Sea (UNCLOS) speaks to conservation and protection in a number of its articles.¹³⁹ Article 61, section 2 requires that the State "shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."¹⁴⁰ Article 194(5) calls for States to take measures "necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine

137. Convention on the Conservation of Migratory Species of Wild Animals, (Bonn), *in force* Nov. 1, 1983, 19 I.L.M. 15.

138. See Convention on Biological Diversity, (Rio de Janeiro), *in force* Dec. 29, 1993, 31 I.L.M. 822 (1993).

139. See United Nations Convention on the Law of the Sea, (Montego Bay), Dec. 10, 1982, *in force* Nov. 1, 1994, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

140. *Id.*

life.”¹⁴¹ Both Article 61 and Article 194(5) would appear to effectively protect marine life. Their effectiveness is of course only as good as the U.N.’s ability to enforce these articles. Unfortunately this is quite limited. In addition, these regulations only apply to signatory States. The United States has failed to sign this Convention for a variety of reasons. While the U.S. does not appear to pose a particularly large threat to these species, its failure to sign brings into serious question the Convention’s global acceptance and enforceability. The U.N. has also adopted the U.N. Food and Agriculture Organization’s Code of Conduct for Responsible Fisheries.¹⁴² This Code specifically identifies fishing gear and protection of non-target species as guiding principles to be maintained in marine conservation efforts. This Code, however, is purely voluntary. While some of its regulations may eventually become accepted as customary international law, until they are enforcement is nearly impossible and threatened and endangered species continue on their way toward extinction.¹⁴³

D. Conclusions of the Dispute Resolution Panel

In a letter from India, Malaysia, Pakistan and Thailand acting jointly, consultations were requested with the United States pursuant to Article 4 of the Understanding of the Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII:1 of GATT.¹⁴⁴ These consultations were sought to discuss the ban imposed under Section 609 on the importation of certain shrimp and shrimp products. These consultations failed to produce a resolution to the matter. Eventually the matter was referred to a Panel. On April 6, 1998, the Panel issued its final report to the parties.¹⁴⁵ Af-

141. *Id.*

142. See Food and Agriculture Organization of the United Nations, Code of Conduct for Responsible Fisheries adopted Oct. 31, 1995, (last modified January 1999) <<http://www.fao.org/WAICENT/faoinfo/fisherie/agreem/codecond/codecon.htm>>.

143. For a general discussion of the formation of international law, see generally Reisman & Wiessner, *supra* note 17.

144. See United States Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, 1998 WL 256632 at 3.

145. See *id.* at 4.

ter nearly 300 pages the Panel concluded that the United States was in violation of GATT and recommended to the Dispute Settlement Body to request that the U.S. bring itself into compliance.¹⁴⁶

This finding and subsequent recommendation were not surprising to any of those that have followed the pattern of decisions which the WTO Panels have issued. Time and time again the environment comes out on the short end. This is logical as the system is set up to protect trade and not the environment. It is interesting to note that the Panel did make mention of the fact that it was not deciding on the urgency of the protection of sea turtles.¹⁴⁷ Instead, as the Panel stated

The matter we have been asked to review is Section 609 as interpreted by the CIT and as applied by the United States on the date this Panel was established. It was not our task to review generally the desirability or necessity of the environmental objectives of the U.S. policy on sea turtle conservation.¹⁴⁸

The Panel almost apologetically went on to state "[i]n our view, and based on the information provided by the experts, the protection of sea turtles throughout their life stages is important and TEDs are one of the recommended means of protection within an integrated conservation strategy."¹⁴⁹ One of the things that came out of this Panel was an increased role for third parties, in particular NGO's.¹⁵⁰ The overall effect of this is yet to be seen. It is possible that large multinational corporations may be able to directly lobby and potentially influence the WTO. On the other hand, smaller, less well financed groups such as those which seek to protect the environment may also have increased access to the Panels. Note that the Panel need not give any credence whatsoever to

146. *See id.* at 300.

147. *See id.*

148. *Id.*

149. *Id.* at 301.

150. *See* James Cameron & Stephen J. Orava, *WTO Opens Disputes to Private Voices*, NAT'L L.J., Dec. 7, 1998, at B5.

any of these amicus briefs unless adopted by the member nation and submitted along with that nation's brief.¹⁵¹

VI. Conclusion

Almost every nation on Earth is a party to CITES or some other agreement or convention which should address the protection the sea turtles. Nevertheless, the precarious situation of the sea turtles persists and continues to worsen. In order to protect this endangered *genus* the United States has enacted certain regulations which efficiently and inexpensively reduce the risk of death to sea turtles. The use of TEDs prevents the unintentional killing of sea turtles through incidental takes by 97%. The regulations mandating the use of TEDs have been enacted for vessels operating in U.S. territorial waters.¹⁵² However, this enforcement scheme has only been effective up to the limits of the U.S. Exclusive Economic Zone, or approximately 200 miles extending seaward from our coasts. Migratory sea turtles, once beyond the limits of our protected waters, face the risk of drowning at the hands of non-regulated shrimp trawlers.

In order to extend this protection beyond our waters, the U.S. as part of Section 609 calls for a ban on the importation of shrimp from nations which do not require the use of TEDs or in some other way protect sea turtles from incidental takes. Congress has given the President the ability to certify nations which comply with the TED regulation or in some other way achieve to a comparable level the reduction in the rate of incidental takes seen in the U.S.¹⁵³ Nations unwilling to adopt these standards face a ban on the import of their goods.¹⁵⁴

Four nations, India, Malaysia, Thailand and Pakistan, have complained to the WTO that this ban amounts to a GATT inconsistent regulation.¹⁵⁵ As such they have requested the formation of a DSP to decide whether or not the

151. *See id.* at B6.

152. *See* 16 U.S.C. § 1537 (1994).

153. *See id.*

154. *See id.*

155. *See* GATT, *supra* note 5.

U.S.'s unilateral action is consistent with GATT. In light of previous decisions, it seems highly unlikely that the DSP will find in favor of the United States. Many of the issues in the Tuna disputes again appear before this Panel.¹⁵⁶ If the Panel finds for the complaining nations the U.S. will be faced with a decision which epitomizes the conflict between trade and environmental protection. The U.S. will need to decide whether it is willing to pay fines or have restricted access to foreign markets for our exported goods in order to continue its policies aimed at protecting the sea turtles. The fines and restrictions, must according to WTO rules, be in proportion to the ban imposed by the United States. Regardless of which choice the U.S. makes, sea turtles will continue to be taken by the thousands.¹⁵⁷

Unless GATT and the WTO are willing to take a stronger stand on protecting the environment, it is quite likely that we will continue to see nations such as the U.S. taking unilateral action in defiance of GATT. While GATT stands in direct opposition to unilateral trade restrictions and the WTO may resolve the dispute in favor of the complaining nations, the United States will still have furthered the cause of saving endangered and threatened species. When initially enacted, Section 609 was applied only to the wider Caribbean, affecting a mere fourteen nations. Twelve of these nations have become certified under the Presidential powers created by Section 609. The effect of the United States enacting a unilateral trade restriction has resulted in improved protections for sea turtles within this sphere originally encompassed by Section 609. In addition, it appears that these nation(s) have had little difficulty in applying Section 609 to their domestic laws and shrimp trawling fleets.

156. See Tuna Panel Report, *supra* note 26.

157. To illustrate, if the dispute resolution panel takes the amount of time anticipated by the WTO and includes the inevitable appeal, the process will take from start to finish approximately 15 months. According to studies done by the United States and India, a complaining nation in this dispute, over 150,000 sea turtles will die in incidental takes during the duration of this dispute. See *Earth Island Inst. v. Christopher*, 913 F. Supp. at 559.

The message being sent by the WTO thus far has essentially said that in order for the United States to be on friendly terms with GATT it must acquiesce to the less restrictive and consequently more harmful regulations of other nations. Lost somewhere between the New World Order and the U.S.'s obligations to free trade and its attempt to protect the world's environment are the sea turtles.

Just as World War II gave rise to our current international system, focusing on the importance of free trade to guarantee a safe and stable world, perhaps it is time that the United States once again takes a leading role in reexamining and refocusing the geopolitical system in order to facilitate trade in a more enlightened manner. This trade must allow for stability not only within economic and political systems but also provide for stability and protection of the environment as well. GATT must be viewed as an experiment which has been largely successful but in light of new developments and advances, we are ready to move on to the next level of guaranteeing global stability not only for our human systems but for its ecosystems as well.

The words of the Panel along with the increased willingness to give a role to non-governmental parties may play out to the benefit of the environment in future disputes. The Panel seemed to recognize that decisions based upon trade consideration may not effectively protect or even deal with the environment.

In reaching these conclusions, we wish to underscore what we have not decided in this Appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly it is. We have not decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect species, such as sea turtles. Clearly they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other national fora,

to protect endangered species or to otherwise protect the environment. Clearly, they should and do.¹⁵⁸

It is possible that all of this offers a glimmer of hope that change may be on the horizon and that this change may come from within the WTO itself. Clearly it has been ineffective on a global scale, from the perspective of environmentalists to act unilaterally. Trade issues have always been inextricably intertwined with environmental issues. It is only relatively recently that this relationship has been recognized by those involved. Perhaps the WTO is beginning to realize it can no longer ignore what has become so apparent.

158. 1998 WL 720123, at 54 (W.T.O.) at para. 185.